SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1739–07 OF 2012
MOHD HISHAMUDIN, AZIAH ALI AND HAMID SULTAN JJCA
20 JANUARY 2014

Arbitration — Award — Costs — Arbitrator awarded full costs to appellant — Application seeking direction as to whether appellant should be entitled to full costs when it was only partially successful — Whether question of law referred to High Court was proper and valid one — Whether question arose out of award — Whether court had jurisdiction to interfere with award of costs made by arbitral tribunal — Arbitration Act 2005 ss 42 & 44

The appellant was appointed as the respondent's architect for a housing project. When disputes arose between the parties in respect of the payment of the appellant's fees, the respondent terminated the services of the appellant. The dispute on fees was referred to arbitration. At the arbitration proceedings the appellant claimed a sum of RM1,224,013.41 as its fees based on the Architects (Scale of Minimum Fees) Rules 1986 ('the Rules'). The respondent, on the other hand, contended that the fees should be calculated on the agreed formula of 2.5% of the total construction costs. The arbitrator found that there was a valid and binding oral contract between the parties for the architectural consultancy services to be provided for a fee of 2.5% of the total construction costs and awarded to the appellant the sum of RM525,000. The award of RM525,000 amounted to 42.89% of the fees claimed by the appellant. In respect of costs the arbitrator decided that the respondent would bear and pay the appellant's costs upon a party and party basis. The respondent was not satisfied with the award of full costs to the appellant because the appellant was only partially successful in its case. The respondent thus filed an originating summons to the High Court seeking direction on the issue as to whether the appellant ought to be awarded the full costs of the arbitration when it was only partially successful. The High Court judge agreed with the respondent and held that the appellant should not be entitled to full costs but only to 50% of the costs of the arbitration proceedings. This was the appeal that arose from that decision. The appellant submitted that the questions raised by the respondent in its OS were not questions of law arising out of the award. It was the appellant's contention that the High Court had no jurisdiction to intervene in the matter of the award of costs because the making of an award on costs was strictly within the jurisdiction of the arbitrator. However, the respondent argued that although the costs to be awarded, was in the discretion of the trial court, the appellate court could interfere if there was an error of law in the exercise of the discretion, and that this principle was equally applicable to a

tribunal. The respondent further maintained that where a litigant was only partially successful, he would only be entitled to a portion of the full costs. A

Held, allowing the appeal with costs of RM15,000:

(1) (per **Mohd Hishamudin JCA**) In the present case, the first question of law referred to the High Court pursuant to s 42(1) of the 2005 Act was not a proper and valid question of law. Upon a closer examination of the issues before the arbitrator in the arbitration proceedings it was clear that the arbitrator had to deal not merely with the issue of the appellant's claim for its professional fee but also the respondent's counterclaim for breach of contract and negligence in the performance of the contract by the appellant. After determining the respondent's counterclaim to be without basis and thus rejecting it, the arbitrator went on to find that the appellant had succeeded in proving its claim and thus awarded costs to the appellant. Based on the decision of the arbitrator it was clear that the manner in which the respondent framed its question of law was not only misleading but also improper, thereby rendering it invalid (see paras 11, 13 & 15). B C D

(2) (per **Aziah Ali JCA**) Further, if it was shown on the face of the award that there had been an apparent failure by the arbitrator to exercise his discretion judicially in the award of costs, then an error of law had occurred which gave rise to a question of law that could be referred to the court under s 42 of the Arbitration Act 2005 ('the 2005 Act'). It was thus possible to formulate a question of law in relation to an award of costs. In the present case, the arbitrator had considered s 44(1)(a) of the 2005 Act, which is a specific provision dealing with the arbitrator's power to award costs, the submissions made by both parties and the principle that costs follow the event before determining that the respondent should bear the appellant's costs of the arbitration. The reasons accompanying the arbitrator's decision on the quantum of costs indicated an exercise of discretion. As such, on the face of the award there was no ground to support the respondent's contention that the arbitrator had committed an error of law (see paras 33 & 39). E F G

(3) (per **Aziah Ali JCA**) Although the appellant had claimed that the issue of quantum of costs did not affect any legal rights of the respondent, the appeal record showed that the costs of the arbitration proceedings would involve a sufficiently substantial sum. Thus, the rights of the respondent were affected by the costs (see para 36). H

(4) (per **Hamid Sultan JCA**) Judicial intervention under the old regime pursuant to the Arbitration Act 1952 was quite common and the threshold to satisfy was much low as reflected in a number of case laws. The cases relied on by the High Court judge and the respondent did not take into consideration the new chapter in arbitration pursuant to the I

2005 Act and the consequential restrictive provisions in the Rules of Court 2012, such as O 69 r 2(1) and O 59 r 2(2). In effect, the court's role to decide on costs of arbitration proceedings had been specifically taken away by virtue of ss 8 and 44 of the 2005 Act. In the circumstances, the specific issue in the present case, which was whether the court had jurisdiction to interfere with an award of costs made by an arbitral tribunal pursuant to the 2005 Act, could not even be framed as a question of law for the determination of the High Court (see paras 50(f)(i) & 51).

[Bahasa Malaysia summary

Perayu telah dilantik sebagai arkitek responden untuk projek perumahan. Apabila pertikaian timbul antara pihak-pihak berkaitan bayaran fi perayu, responden telah menamatkan perkhidmatan perayu. Pertikaian berhubung fi itu telah dirujuk kepada timbang tara. Dalam prosiding timbang tara perayu menuntut sejumlah RM1,224,013.41 sebagai fi perayu berdasarkan Kaedah-Kaedah Arkitek (Skala Fi minimum) 1986 ('Kaedah tersebut'). Responden, sebaliknya, berhujah bahawa fi itu patut dikira berdasarkan formula yang dipersetujui iaitu 2.5% daripada keseluruhan kos pembinaan. Penimbang tara mendapati bahawa terdapat kontrak lisan yang sah dan mengikat antara pihak-pihak untuk perkhidmatan perundingan arkitek diperuntukkan fi 2.5% daripada keseluruhan kos pembinaan dan diawardkan kepada perayu sejumlah RM525,000. Award RM525,000 berjumlah 42.89% daripada fi yang dituntut oleh perayu. Berhubung kos penimbang tara memutuskan bahawa responden akan menanggung dan membayar kos perayu atas dasar pihak ke pihak. Responden tidak berpuas hati dengan award untuk kos sepenuhnya kepada perayu kerana perayu hanya berjaya sebahagian sahaja dalam kesnya. Responden oleh itu memfailkan saman pemula ('SP') ke Mahkamah Tinggi memohon arahan berhubung isu itu untuk sama ada perayu patut diawardkan kos penuh timbang tara apabila ia hanya berjaya sebahagian sahaja. Hakim Mahkamah Tinggi bersetuju dengan responden dan memutuskan bahawa perayu tidak berhak memperoleh kos sepenuhnya tetapi hanya 50% daripada kos prosiding timbang tara itu. Ini adalah rayuan yang timbul daripada keputusan tersebut. Perayu berhujah bahawa persoalan yang ditimbulkan oleh responden dalam SPnya bukan persoalan undang-undang yang timbul daripada award itu. Adalah hujah perayu bahawa Mahkamah Tinggi tiada bidang kuasa untuk campur tangan dalam perkara berhubung award untuk kos itu kerana untuk membuat award bagi kos jelas dalam bidang kuasa penimbangtara. Walau bagaimanapun, responden berhujah bahawa meskipun kos yang akan diawardkan, adalah atas budi bicara mahkamah perbicaraan, mahkamah rayuan boleh campur tangan jika terdapat kesilapan undang-undang dalam pelaksanaan budi bicara itu, dan bahawa prinsip ini sama terpakai kepada tribunal. Responden selanjutnya menegaskan bahawa di

mana litigan hanya berjaya sebahagian sahaja, dia hanya berhak memperoleh sebahagian daripada kos keseluruhan. A

Diputuskan, membenarkan rayuan dengan kos RM15,000:

(1) (oleh **Mohd Hishamudin HMR**) Dalam kes ini, persoalan undang-undang pertama yang dirujuk ke Mahkamah Tinggi menurut s 42(1) Akta 2005 bukan persoalan undang-undang yang wajar dan sah. Setelah meneliti isu-isu dalam prosiding timbang tara itu adalah jelas bahawa penimbang tara bukan hanya perlu mengendalikan isu berhubung tuntutan perayu untuk fi profesionalnya tetapi juga tuntutan balas responden untuk pelanggaran kontrak dan kecuaian dalam pelaksanaan kontrak itu oleh perayu. Selepas menentukan tuntutan balas responden adalah tanpa asas dan dengan itu menolaknya, penimbang tara telah mendapati perayu berjaya membuktikan tuntutannya dan oleh itu mengawardkan kos kepada perayu. Berdasarkan keputusan penimbang tara adalah jelas bahawa perkara di mana responden membentuk persoalan undang-undangnya bukan sahaja mengelirukan tetapi juga tidak wajar, dengan itu menyebabkannya menjadi tidak sah (lihat perenggan 11, 13 & 15). B C D

(2) (oleh **Aziah Ali HMR**) Selanjutnya, jika ia ditunjukkan pada award itu bahawa terdapat kegagalan oleh penimbang tara untuk melaksanakan budi bicaranya secara adil dalam memberi award untuk kos, maka kesilapan undang-undang yang jelas telah berlaku sehingga menimbulkan persoalan undang-undang yang boleh dirujuk ke mahkamah di bawah s 42 Akta Timbang Tara 2005 ('Akta 2005'). Oleh itu adalah mungkin untuk merumuskan persoalan undang-undang berkaitan award untuk kos. Dalam kes ini, penimbang tara telah mengambil kira s 44(1)(a) Akta 2005, yang merupakan peruntukan spesifik berkenaan kuasa penimbang tara untuk memberi award untuk kos, hujah dibuat oleh kedua belah pihak dan prinsip bahawa kos perlu mengikut kejadian sebelum menentukan responden patut menanggung kos timbang tara perayu. Alasan-alasan yang disertakan dalam keputusan penimbang tara berhubung kuantum untuk kos menunjukkan pelaksanaan budi bicara. Oleh itu, berdasarkan award itu tiada alasan untuk menyokong hujah responden bahawa penimbang tara itu telah melakukan kesilapan undang-undang (lihat perenggan 33 & 39). E F G H

(3) (oleh **Aziah Ali HMR**) Walaupun perayu telah mendakwa bahawa isu berhubung kuantuk untuk kos tidak menjejaskan hak undang-undang responden, rekod rayuan menunjukkan bahawa kos prosiding timbang tara melibatkan jumlah yang agak besar. Oleh itu, hak responden memang terjejas oleh kos itu (lihat perenggan 36). I

(4) (oleh **Hamid Sultan HMR**) Campur tangan kehakiman di bawah rejim lama menurut Akta Timbang Tara 1952 agak biasa dan nilai ambang

untuk memuaskan lebih rendah sebagaimana digambarkan dalam beberapa kes undang-undang. Kes-kes yang digunakan oleh hakim Mahkamah Tinggi dan responden tidak mengambil kira bab baru dalam timbang tara menurut Akta 2005 dan peruntukan berikutnya yang terhad dalam Kaedah-Kaedah Mahkamah 2012, seperti A 69 k 2(1) dan A 59 k 2(1). Kesannya, peranan mahkamah untuk memutuskan kos prosiding timbang tara telah diambil khususnya menurut ss 8 dan 44 Akta 2005. Dalam keadaan itu, isu spesifik dalam kes ini, iaitu sama ada mahkamah mempunyai bidang kuasa untuk campur tangan dengan award untuk kos yang dibuat oleh tribunal timbang tara menurut Akta 2005, tidak boleh dijadikan sebagai persoalan undang-undang untuk penentuan Mahkamah Tinggi (lihat perenggan 50(f)(i) & 51).]

Notes

For cases on costs, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1667–1670.

Cases referred to

Childs v Blacker [1954] 1 WLR 809, CA (refd)
Chin Yoke Choong Bobby & Anor v Hong Lam Marine Pte Ltd [2000] 1 SLR 137, CA (refd)
Crystal Realty Sdn Bhd v Tenaga Insurance (M) Sdn Bhd [2008] 3 CLJ 791, CA (refd)
ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35; [2013] 1 LNS 99, CA (refd)
Khalid Panjang & Ors v PP (No 2) [1964] 1 MLJ 108, FC (refd)
Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan [2002] 3 MLJ 155, CA (refd)
P Rosen and Company Ltd v Dowley and Selby [1943] 2 All ER 172, KBD (refd)
Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew [1987] 1 MLJ 25, SC (refd)
President of India v Jadranska Sobodna Plovidba [1992] 2 Lloyd's Rep 274, QBD (folld)
Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872, HC (refd)
Taman Bandar Baru Masai Sdn Bhd v Dinding Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (refd)
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang [1987] 2 MLJ 611; [1987] 2 CLJ 302, SC (refd)
Wah Bee Construction Engineering v Pemhenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 10, 42, 42(1), 44, 44(1), (1)(a), Part III
Architects (Scale of Minimum Fees) Rules 1986

Rules of Court [SG] O 59 r 2(2)
Rules of Court 2012 O 59, O 59 rr 2(1), (2), 12(1)(a), (b), O 69 r 2(1)

Appeal from: Originating Summons No 24–1736 of 2011 (High Court, Shah Alam)

Ernest Azad (Ernest Azad & Assoc) for the appellant.
KL Pang (ZT Chok with him) (Cheah Teah & Su) for the respondent.

Mohd Hishamudin JCA:

[1] This appeal concerns 'two questions of law' referred by the respondent to the High Court by originating summons pursuant to s 42(1) of the Arbitration Act 2005.

[2] The respondent was the plaintiff before the High Court; whilst the appellant in the appeal before this court was the defendant at the High Court.

[3] Section 42(1) provides:

> *References on questions of law*
>
> 42(1) Any party may refer to the High Court any question of law arising out of an award.

[4] The two questions of law referred to the High Court are:

> *Question 1*
>
> Whether the defendant [Appellant] ought to be awarded the full costs of the arbitration when the defendant [Appellant] claimed for the sum of RM1,224,013.41 but was only awarded the sum of RM525,000.00 ie 42.89% of its claim?
>
> *Question 2*
>
> If the answer to Question 1 is in the negative, how should the costs of the arbitration be awarded in such circumstances?

[5] At the arbitration proceeding, the appellant/defendant was the claimant; whilst the respondent/plaintiff was the respondent.

[6] The learned High Court judge allowed the respondent's application by admitting the questions as proper questions of law for reference to the High

Court; by answering the first question in the negative; and by answering the second question to the effect that the appellant ought to be awarded only 50% of the costs.

[7] Aggrieved by the decision, the appellant appeals to the Court of Appeal.

[8] I am allowing the appeal with costs.

[9] In my judgment, for a proper invocation of s 42(1) of the Arbitration Act 2005, the question referred to the High Court must be a proper and valid question of law.

[10] For the purpose of this judgment, I need only to focus on the first proposed question, since the second proposed question is consequential in nature.

[11] In my view, in the present case, this particular 'question of law' referred to the High Court purportedly pursuant to s 42 is not a properand valid question of law.

[12] But how does one determine whether a particular question raised is a proper and valid question of law or not? In my judgment, one does so by considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator.

[13] In the case before us, the manner the question is framed by the respondent/plaintiff (the respondent in the arbitration proceeding) for the High Court's consideration appears to suggest that the issue before the arbitrator is simply this: it is purely a question of a claim for the payment of professional fee in the sum of RM1,224,031.41. However, upon a closer examination of the issues before the arbitrator, this, clearly, is not the case to be. There is more than meets the eye; for, upon examining the issues before the arbitrator, I find that the arbitrator had to deal not merely with the issue of the claim for professional fee by an architect, but it also had to deal with the issue of the respondent's counterclaim for breach of contract and for negligence performance of contract on the part of the appellant/defendant (the claimant in the arbitration proceeding), which counterclaim was dismissed by the arbitrator. The following is the ruling by the arbitrator:

8.5 The respondent's (respondent's/plaintiff's) Counterclaim

8.5.1 I had determined that the claimant's (appellant's/defendant's) withdrawal of services was valid and that it was not in breach of its contractual obligations nor had it repudiated the Contract. As such, the issue of damages for breach of contract does not arise.

8.5.2 I find that the respondent's claim that the claimant was guilty of negligence in the performance of services as the architect for the project, is without any merit whatsoever.

8.5.3 I therefore determine that the respondent's counterclaim is without any basis and is thus rejected.

[14] And in determining the liability as to costs, the arbitrator, in awarding full costs to the appellant (the claimant in the arbitration proceeding), had correctly taken into account this dismissal of the respondent's (the respondent in the arbitration proceeding) counterclaim in the arbitration proceeding. This is what the arbitrator said:

10.5 The claimant has proved and recovered a substantial amount as professional fees, in this proceeding. The respondent's counter claim based on the alleged breach of the terms of the contract have been rejected. I do not find any merit in either of the respondent's contentions on this issue. I therefore hold that the claimant to have been successful in this arbitration.

10.6 It is a basic principle of the law of costs, that costs should ordinarily follow the event, the event being the success of a party's case. A successful party is prima facie entitled to his costs.

10.7 I determine that the costs of this arbitration, which is the costs of the reference and the costs of the Award, is to be borne by the respondent.

[15] Thus, the respondent/plaintiff should not have framed the proposed question in the manner that it did. It is not only misleading but is also an improper framing of the question, thereby rendering the question invalid.

[16] The order of the High Court must be set aside, and the award of the arbitrator on costs is restored.

Aziah Ali JCA:

[17] The appellant, SDA Architects ('the defendant') appeals against the decision of the High Court made under s 42(1) of the Arbitration Act 2005 ('the Act') pursuant to a reference of two questions of law by the respondent ('the plaintiff') arising out of an arbitral award.

[18] Section 42 of the Act provides as follows:

(1) Any party may refer to the High Court any question of law arising out of an award

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(4) The High Court may, on the determination of a reference

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

(5) Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

[19] The two questions of law referred to the High Court by the respondent read as follows:

(a) whether the defendant (appellant herein) ought to be awarded the full costs of the arbitration when the defendant claimed for the sum of RM1,224,013.41 but was only awarded the sum of RM525,000 ie 42.89% of its claim?

(b) if the answer to Q1 is in the negative, how should the costs of the arbitration be awarded in such circumstances?

[20] The learned judge allowed the respondent's application and answered Q1 in the negative. Following the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611; [1987] 2 CLJ 302 Her Ladyship agreed with learned counsel for the respondent that where a litigant is only partially successful, he would be entitled only to a portion of the costs, and the court can interfere on the issue of costs if it can be shown that, in the exercise of his discretion, there was an error of law on the part of the arbitrator in the award of costs.

[21] In respect of Q2, the learned judge agreed with the respondent that since the appellant was only 42.89% successful in its claim therefore the appellant is only entitled to half of the costs in the arbitration proceedings. The learned judge thereupon allowed the application and varied the award on costs from full costs to half costs. Hence this appeal. Having considered the appeal record and the submissions of both parties I allow this appeal with costs for the

reasons stated below.

SALIENT FACTS

[22] The respondent had engaged the appellant as an architect for a housing project in Kota Damansara, Petaling Jaya. Disputes arose between the parties in respect of payment of the appellant's fees and the respondent terminated the services of the appellant. The appellant refused to issue a letter of release to the respondent to enable the respondent to appoint a replacement architect until and unless its fees for services rendered were paid in full. The dispute was referred to Lembaga Arkitek Malaysia ('LAM') which appointed Mr Thurai Das Thuraisingham as the sole arbitrator ('the arbitrator') of the dispute on fees.

[23] At the arbitration proceedings the appellant claimed its fees on the basis that the fees should be calculated based on the Architects (Scale of Minimum Fees) Rules 1986 ('the Rules'). The respondent on the other hand contended that the fees should be calculated based on the agreed formula of 2.5% of the total construction costs. The arbitrator found that there was a valid and binding oral contract between the parties for architectural consultancy services to be provided for a fee of 2.5% of total construction cost and awarded to the appellant the sum of RM525,000 amounting to 42.89% of the fees claimed. Neither party contested the quantum of fees awarded.

[24] In respect of costs at para 10 of the final award, the arbitrator states as follows (see pp 502–503 of the appeal record):

> *10 Costs of The Arbitration*
>
> 10.1 Statutory provisions on the issue of costs of the arbitration which is the costs of reference and the award, are found in, Section 44, Part III of the Arbitration Act 2005.
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> Section 44(1)(a)(i) reads as follows:
>
> Unless otherwise agreed by the parties —
>
> (a) the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may —
>
> (i) direct to and by whom and in what manner those costs or any part thereof shall be paid;
>
> 10.2 The claimant submits that as costs follow the event, the arbitrator has the discretion to award costs to whichever party that is successful in the arbitration.
>
> 10.3 The respondent contends that costs of the arbitration ought to be awarded to them, if the award for fees is for less than half of what SDA claimed for, ie RM1,224,013.41

10.4 The respondent also submits that arbitration proceedings may have been avoided had the claimant been more reasonable for compensation in exchange for the letter of Release.

10.5 The claimant has proved and recovered a substantial amount as professional fees, in this proceedings. The respondent's counter claim based on the alleged breach of the terms of the contract have been rejected. I do not find any merit in either of the respondent's contentions on this issue. I therefore hold that the claimant to have been successful in this arbitration.

10.6 It is a basic principle of the law of costs, that costs should ordinarily follow the event, the event being the success of a party's case. A successful party is prime facie entitled to his costs.

10.7 I determine that the costs of this arbitration, which is the costs of the reference and the costs of the Award, is to be borne by the respondent.

[25] At para 11.1 the arbitrator states, inter alia, (p 504 of the appeal record):

(v) the respondent, shall bear and pay the claimant's costs in this arbitration, upon a party and party basis.

(vi) the respondent shall bear and pay the costs of this final award, and if the claimant has already paid the whole or any part of such costs, the respondent shall within twenty one (21) days from the date upon which either party shall have taken up this final award, reimburse the claimant accordingly.

THE APPEAL

[26] Before us learned counsel for the appellant Mr Ernest Azad submits that:

(a) the High Court has no jurisdiction to intervene in the matter of the award of costs as the making of an award on costs is strictly within the jurisdiction of the arbitrator (s 44(1)(a) of the Act);

(b) s 8 of the Act limits the court's intervention in arbitral matters;

(c) the court's jurisdiction under s 44 is limited to taxation of costs on application of a party where the arbitral tribunal fails to specify the amount of such costs and expenses within 30 days of having been requested to do so.

[27] Learned counsel submits that the questions raised by the respondent are not questions of law arising out of the award for the following reasons:

(a) s 44(1) of the Act is a specific provision which deals with the arbitrator's powers to award costs;

(b) s 8 becomes operative and therefore renders this matter out of the court's powers to intervene (*Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872); and

(c) an order of costs is a consequential order and should not be considered as a question of law.

[28] Learned counsel further submits that the ability to challenge an award whether made by a judge or arbitrator in respect of costs is limited as *the awarding of costs involves an exercise of judicial discretion not the recognition of a legal right* (*President of India v Jadranska Sobodna Plovidba* [1992] 2 Lloyd's Rep 274 at p 278). It is submitted that the issue on quantum of costs does not affect any legal right of the respondent. Further it is submitted that since O 59 r 2(2) of the Rules of Court 2012 does not empower a court to order costs of arbitration proceedings therefore it is likewise not empowered to vary the arbitrator's award of costs (*Chin Yoke Choong Bobby & Anor v Hong Lam Marine Pte Ltd* [2000] 1 SLR 137). Learned counsel submits that the authorities of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* and *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25 relied on by the learned judge are not applicable as these two cases did not involve arbitration awards.

[29] For the respondent learned counsel Mr KL Pang submits that notwithstanding that costs is the discretion of the trial court, the appellate court may interfere if there is an error of law in the exercise of its discretion (*Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* and this principle is equally applicable to the powers of the court to interfere with an award of costs by an arbitrator in arbitration proceedings if it is shown that the tribunal has failed in its duty to exercise its discretion judicially since a failure to exercise the discretion judicially is the same as a failure to exercise it at all (*President of India v Jadranska Sobodna Plovidba* at p 278).

[30] Learned counsel submits that where a litigant is only partially successful, he would only be entitled to a portion of the full costs (*Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang*). In the present case the appellant was only partially successful but the arbitrator had awarded full costs of the arbitration proceedings. Therefore it is submitted that the learned judge was correct to interfere with the arbitrator's award on costs as there was an error of law in the exercise of the discretion.

[31] In respect of s 8 of the Act, learned counsel submits that s 8 has nothing to do with the powers of the court to interfere with the arbitrator's award of costs. Further s 8 is subject to s 42 which allows questions of law to be referred to the High Court and this include questions of law relating to costs. With regard to s 44 learned counsel submits that s 44 does not apply since this

provision provides for taxation of costs by the High Court where the arbitrator fails to specify the quantum and in this case the award of costs is expressly set out in the award and forms part and parcel of the award.

[32] I am of the view that the first issue that calls for consideration is whether in this case the award of costs by the arbitrator raises a question of law. The appellant contends that the questions raised by the respondent are not questions of law.

[33] I am in agreement with the respondent that where it is shown on the face of the award that there has been an apparent failure by the arbitrator to exercise his discretion judicially in the award of costs, then an error of law has occurred which may give rise to a question of law that may be referred to the court under s 42 of the Act. I find support from the case of *President of India v Jadranska Sobodna Plovidba* which shows that a question of law may be formulated on the basis that an error of law has been occasioned when the arbitrator has failed to exercise his discretion judicially in making an award of costs. Hobhouse J said at p 278:

> The award of costs raises the same considerations, and the same principles are applicable, whether it is an award by a Judge in litigation or by an arbitrator in an arbitration. The ability to challenge the award is limited; it is not open to appeal in the same way as a decision of law or fact. The reason is that the awarding of costs involves an exercise of a judicial discretion not the recognition of a legal right It therefore becomes a question of showing that the tribunal failed in its duty to exercise its discretion on costs and to do so judicially. A failure to exercise it is misconduct; a failure to exercise the discretion judicially is the same as a failure to exercise it at all.
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> In arbitration the requirement that the arbitrator exercise his discretion on costs is stated in s 18 of the 1950 Act and the discretion must be exercised judicially. (*Smeaton Hanscomb v Sassoon I Setty (No 2),* [1953] 2 Llyod's Rep 580; [1953] 1 WLR 1481).
>
> The legal test will in effect remain the same; the appellant will have to satisfy the Court, on the reasons, that the arbitrator misdirected himself on what was involved in the judicial exercise of his discretion or that, although there was no express misdirection, it must be inferred that he did misdirect himself because that is the only explanation of his award. If the arbitrator departs from the ordinary principle that costs follow the event without including in his reasons a justification for so doing, the inference may be drawn. Considering whether there has been an error of law in making or refusing to make an award of costs was recognized as a possibility, and sanctioned, by what the House of Lords said on the preliminary question in *Donald Campbell v Pollack*; Viscount Cave said at p 741:
>
> > In my opinion, the true rule is that, whilst this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law.

[34] Further at pp 278–279 Hobhouse J said: A

> A statement of Sir Joseph Napier in Yeo v Tatem LR 3 PC at 702 was also approved ([1927] AC at pp 745 and 747):
>
> > Where there has been a mistake upon some matter of law that governs or affects costs — some matter that involves the due application of principles of law — the party prejudiced is entitled to have the benefit of correction by appeal. B
>
> It is thus possible (though exceptional) to formulate a question of law in relation to an award of costs. C

[35] Section 42 further states that it must also be shown that the question of law substantially affects the rights of one or more of the parties. Learned counsel for the appellant has submitted that the issue of quantum of costs does not affect any legal right of the respondent. However in *President of India v Jadranska Sobodna Plovidba* Hobhouse J said at p 279: D

> … a question of costs can be categorized as affecting the rights of the parties.
>
> The rights referred to must include the rights which arise from the award itself. On this basis, what the applicant for leave has to do is to show that the sum involved in the costs award is sufficiently substantial and depends upon the resolution of the alleged question of law. E

[36] Thus a question of costs does affect the rights of the parties and the rights of the respondent are affected since the record of the arbitration proceedings as found in the appeal record shows that costs of this arbitration proceedings will involve a sufficiently substantial sum. F

[37] The next issue to be considered is whether on the face of the award there is an error of law committed by the arbitrator as contended by the respondent. The respondent relies on the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* in support of its contention that the arbitrator has committed an error of law. In that case the respondent was successful only in part of his claim but the learned judge awarded full costs of the proceedings to the respondent. Hashim Yeop Sani SCJ said: G H

> Since the respondent was partially successful in the High Court he should therefore be entitled to half the costs in the High Court. I

[38] I find from the award that the arbitrator had, in making the award of costs, considered s 44(1)(a) of the Act and the submissions made by both parties (see paras 10.2, 10.3 and 10.4 at pp 502–503 of the appeal record). The

arbitrator was aware of the principle that costs should ordinarily follow the event and that a successful party is prima facie entitled to his costs. At para 10.5 the arbitrator considered that the appellant has proved and recovered a substantial amount as professional fees and he had found no merit and had rejected the respondent's counterclaim. Having considered these matters the arbitrator determined that the respondent shall bear the appellant's costs of the arbitration (p 505 of the appeal record).

[39] The award shows that the arbitrator has applied his mind to the principle that costs follow the event but for the reasons stated in the award the arbitrator exercised his discretion to award full costs. I find that on the face of the award there is no ground to support the respondent's contention that the arbitrator has committed an error of law. The learned judge, in finding that the arbitrator has committed an error of law, has not sufficiently considered that the award shows that the arbitrator did appreciate the principle on the award of costs but, for the reasons stated in his award, had decided to exercise his discretion and award full costs to the appellant. Whilst the court may differ from the arbitrator as to the amount of costs to be awarded to the appellant, in my considered opinion that is not sufficient reason to interfere with the quantum of costs where the arbitrator has given reasons for his decision on the amount of costs he has awarded. To my mind the reasons that accompanied the decision on the quantum of costs indicates an exercise of discretion. Consequently I find that the learned judge has erred by allowing the respondent's application and interfering with the arbitrator's award of costs.

[40] For the reasons stated above the appeal is therefore allowed. The order of the High Court is set aside and the award of costs made by the arbitrator is restored. Costs of RM15,000 to the respondent. Deposit to be refunded.

Hamid Sultan JCA:

[41] The appellant's (architect) appeal in respect of the award of 'party to party costs' by the arbitrator in a dispute relating to quantum of fees the architect is entitled to, came up for hearing on 9 October 2013, and upon hearing submission we reserved judgment to 20 January 2014. My learned brother Mohd Hishamudin bin Mohd Yunus JCA and learned sister Aziah bt Ali JCA have written separate judgments allowing the appeal. This is my judgment.

BRIEF FACTS

[42] The appellant was the architect engaged by the respondent. The parties

could not agree as to the quantum of fees to be paid to the architect. Lembaga Arkitek Malaysia referred the dispute to arbitration.

[43] Before the arbitrator, the appellant claimed a sum of RM1,224,013.41 as its fees based on Architects (Scale of Minimum Fees) Rules 1986. The respondent contended the fees should be calculated on the agreed formula of 2.5% of the total construction costs.

[44] The arbitrator agreed with the respondent's contention and awarded RM525,000. Both the appellant and respondent have no dispute as to the quantum of fees awarded. The dispute was as to award of costs by the arbitrator upon party to party basis.

[45] The respondent was not satisfied with the award of full costs to the appellant as the appellant was only partially successful ie its claim for RM1,224,013.41 was reduced to RM525,000. To address the issue the respondent filed an originating summons seeking two questions of law:

1. Whether the Appellant ought to be awarded the *full* costs of the arbitration when the Appellant claimed for the sum of RM1,224,013.41 but was only awarded the sum of RM525,000 ie *42.89%* of its claim. (Emphasis added.)
2. If the answer to question 1 is in the negative, how should the costs of the arbitration be awarded in such circumstances.

[46] The learned High Court judge on the first question took the view that full costs should not be awarded and on the second question decided to award 50% of the costs of the arbitration proceedings. On both issues the learned judge had this to say:

> … the arbitrator has awarded full costs to the Appellant when the Appellant is only 42.89% successful. Based on the authority of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 CLJ 302, I hold that the Appellant is only entitled to half of the costs in the arbitration proceedings. So, the answer to question 1 is 'No'.

[47] The respondent before us, inter alia, submitted as follows:

> 14.1. Although costs is in the discretion of the trial court, the appellate court may interfere if there is an error of law in the exercise of discretion. (see *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25, Supreme Court (per Hashim Yeop A Sani SCJ) at p 26).
>
> 14.2. This principle is equally applicable to the powers of the court to interfere with an award of costs by an arbitrator in arbitration proceedings. (see *President of India v Jadranska* [1992] 2 Lloyd's LR 274 (per Hobhouse J) at p 278).

14.3. It is trite law that where a litigant is only partially successful, he would not be entitled to the full costs of the proceedings but only a portion thereof. [See *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Sian* [1987] 2 CLJ Rep 404, Supreme Court (per Hashim Yeop Sani SCJ) at p 418].

14.4. In the instant case, it is an undisputed fact that the appellant was only partially successful in its claim for architect's fees — 42.89% successful to be exact. The appellant was not successful on the basis of calculating the quantum of the architect's fees. The arbitrator agreed with the respondent's basis instead — which resulted in a reduction of the appellant's claim.

14.5. It is not without precedent for the courts to interfere with the award of costs by an arbitrator. [See for instance, *Lewis v Haverfordwest RDC* [1953] 2 All ER 1599 (per Lord Goddard CJ) at p 1599–1600.

[48] The learned counsel for the appellant's submission can be summarised as follows:

(a) the making of an award on costs is strictly within the jurisdiction of the arbitrator as per the Arbitration Act 2005 (AA 2005). The High Court has no jurisdiction to intervene in the matter of the award of costs and relies upon s 44(1) of the AA 2005 which reads as follows:

> 44 (1) Unless otherwise agreed by the parties —
>
> (a) the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may —
>
> (i) direct to and by whom and in what manner those costs or any part thereof shall be paid;
>
> (ii) tax or settle the amount of such costs and expenses; and
>
> (iii) award such costs and expenses to be paid as between solicitor and client;
>
> (b) any party may apply to the High Court for the costs to be taxed where an arbitral tribunal has in its award directed that costs and expenses be paid by any party, but fails to specify the amount of such costs and expenses within thirty days of having being requested to do so;
>
> or
>
> (c) each party shall be responsible for its own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration.

And relies on the case of *President of India v Jadranska Slobodna Plovidba* [1992] 2 Lloyd's 274 at 278 where the court held that the ability to challenge an award whether made by a judge or arbitrator in respect of

costs was limited since the awarding of costs involved an exercise of a judicial discretion not the recognition of a legal right.

(b) s 8 of the AA 2005 prohibits the intervention of the court. Section 8 of the AA 2005 states:

> 8 No court shall intervene in matters governed by this Act, except where so provided in this Act.

And relies on the case of *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872 @ 884, where Aziah Ali J (as Her Lady then was) considered s 8 of the Act and said that the court's power to intervene is limited to what is expressed in the provision, which is, unless the Act provides otherwise, the court cannot intervene.

(c) the previous wordings for s 8 were 'Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.' The 2011 amendment to this section was to make the section consonant with article 5 of the UNCITRAL Model Law. The effect of the amendment has not altered the purport of s 8 which is to limit the court's intervention in arbitral matters.

(d) the court's jurisdiction under s 44 is limited to taxation of costs on the application of a party where the Arbitral Tribunal fails to specify the amount of such costs and expenses within 30 days of having been requested to do so. The arbitrator in this case did not specify the amount of such costs.

(e) for s 42(1) of the AA 2005 to be operative in the instant case, the question of law arising out of an award must be a question of law that substantially affects the rights of the party seeking the court's intervention.

(f) the questions raised by the appellant are not questions of law arising out of the award for three reasons:

(i) Firstly, there is already a specific provision (s 44(1)) which deals with the arbitrator's power to award costs. Secondly, as there is already a provision in the Act in respect of costs, s 8 becomes operative and therefore renders this matter out of the court's power to intervene. Thirdly, an order of costs is a consequential order and this should not be considered as a question of law.

(g) the issue on quantum of costs does not affect any legal rights of the respondent. As the arbitrator had not determined the quantum, the parties have recourse to the High Court to tax the costs.

And relies on O 59 r 12(1)(a) and (b) of the Malaysian Rules of Court 2012 which says:

> 12 Subject to Order 59, rule 7, the Registrar shall have power to determine —

(a) the costs of or arising out of any cause or matter in the Court;

(b) the costs directed by an award made on a reference to arbitration under any written law or pursuant to an arbitration agreement to be paid;

And also relies on the Singapore case of *Chin Yoke Choong Bobby & Anor v Hong Lam Marine Pte Ltd* [2000] 1 SLR 137, where the Singapore Court of Appeal referred to O 59 r 2(2) of their Rules of Court which is parai materia with O 59 r 2(2) of our Rules of Court 2012 and stated that 'the Rule did not confer upon the courts, the power to order costs of arbitration proceedings, as it may for court proceedings'.

(h) The learned High Court judge had erred in relying on the cases of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611; [1987] 2 CLJ 302 and *Petroliam Nasional Bhd (Petronas) & Anor v Cheah Kam Chiew* [1987] 1 MLJ 25, in her grounds for varying the arbitral award. Both cases were appeals from the High Court. They did not involve arbitration awards and it is submitted these cases are of no guide to the relevant statutory provisions concerning award of cost in Arbitration under s 44 of the Arbitration Act 2005.

[49] In response the learned counsel for the respondent, inter alia, submits as follows:

(a) The appellant's contention that 'the High Court has no jurisdiction to intervene in the matter of the award of cost' is erroneous. The appellant's own authority in *President of India v Jadranska* confirms that the courts have jurisdiction to interfere with the arbitrator's award of costs and that the test whether the courts should interfere is similar to when an appellate court interferes with the trial court's award of costs;

(b) The appellant's contention also ignores the provision in s 42 of the Act and the case of *Lewis v Haverfordwest RDC*;

(c) Section 8 of the Act is also not relevant because it is qualified in that the court may interfere where so provided in this Act' and the court's powers to interfere are provided in s 42 of the Act;

(d) The issue of taxation of costs raised is also not relevant and is separate from the question of law whether the appellant is entitled to full costs or only a portion of the costs;

(e) The appellant's contention that the two questions are 'not questions of law arising out of the award' is also without merits;

(f) First, s 44 of the Act only deals with the award of costs by the arbitrator in the arbitration proceedings and for taxation of costs by the High Court if the arbitrator fails to specify the quantum when requested to do so. On the

other hand, s 42 of the Act deals with reference to the High Court on 'any question of law arising out of an award', which includes question of law relating to costs.

(g) Secondly, s 8 of the Act is not relevant because it is subject to the express provision in s 42 of the Act.

(h) Thirdly, the award of costs is expressly set out in the award and forms part and parcel of the award.

(i) The High Court's decision in *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* deals with the issue whether the High Court can consider other factors apart from those expressly set out in s 10 of the Act when deciding whether to stay the proceedings in the High Court for the disputes to be referred to arbitration. It has nothing to do with the powers of the court to interfere with the arbitrator's award of costs.

The decision of the Singapore's Court of Appeal in *Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd* involves the issue whether the court has powers to order, by way of a separate action, costs of the arbitration proceedings to be borne by the receivers and managers of the party against which the arbitrator had awarded costs. It also has nothing to do with the powers of the court to interfere with the arbitrator's award of costs.

In respect of the English decision in *President of India v Jadranska*, the appellant only quoted part of a sentence. The whole passage, which supports the respondent's case, reads as follows:

> The award of costs raises the same considerations and the same principles are applicable, whether it is an award by a Judge in litigation or by an arbitrator in an arbitration. The ability to challenge the award is limited; it is not open to appeal in the same way as a decision of law or fact. The reason is that the awarding of costs involves an exercise of a judicial discretion not the recognition of a legal right. *It therefore becomes a question of showing that the tribunal failed in its duty to exercise the discretion on costs and to do so judicially.* A failure to exercise its misconduct; a failure to exercise the discretion judicially is the same as a failure to exercise it at all. (In arbitration it has also on occasions been rationalized as an excess of the jurisdiction conferred by s 18 of the 1950 Act.

(Emphasis added.)

[50] I have read the appeal records and the submissions of the learned counsel in detail. I am grateful to the comprehensive submissions. After much consideration to the submission of the learned counsel for the respondent, I am of the considered view that the appeal must be allowed. My reasons, inter alia, are as follows:

(a) it is well settled that the Scheme of the AA 2005 is to almost prohibit the intervention of court relating to arbitration awards unless the Act

specifically gives jurisdiction and power to intervene. In *Taman Bandar Baru Masai Sdn Bhd v Dinding Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83, while considering ss 8, 42 and other provisions of the AA 2005 I had made the following observations:

> The AA 2005 must be seen to be a new chapter to the law, practice, and intervention of court etc in arbitration proceedings. The jurisdiction to ensure that courts do not intervene and meddle with arbitration proceedings is clearly set out in various provisions of the Act. Pre-2005 cases which provide room for interference with arbitrator's decision must now be treated as otiose, as AA 2005 has been shrewdly worded to ensure that courts ordinarily do not interfere with arbitration awards.
>
> I will say that draftsmen of provisions such as ss 8, 9, 37 and 42 have with great ingenuity asserted that court should not interfere with arbitrator's award without out rightly saying so. If they have said so out rightly, it will stand to be unconstitutional. Thus, it will appear that it is going to be difficult to frame any question of law pursuant to AA 2005 when the subject matter of complaint is one which is restricted by ss 9, 37, or 42 etc. It is now for the courts themselves to restrain from interference unless it is a case of patent injustice which the law permit the court in clear terms to intervene. It is trite that AA 2005 is meant to promote one-stop adjudication. In *Lesotho Highland Development Authority v Impregilo Spa* [2005] UKHL 43, Lord Steyn sitting in the House of Lords had this to say:
>
> > I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed; it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point.
>
> The moral of the story is that once parties have agreed to arbitration agreement they must be prepared to be bound by the decision and refrain from approaching the court to give hair splitting decision arising from ingenious arguments which often results in erroneous judgments not anticipated by Parliament. *Constant interference of the court as was the case in the past will defeat AA 2005 which is for all intent and purpose to promote one-stop adjudication in line with International mandate.* (Emphasis added.)

(b) issue of law ordinarily will relate to substantive rights. It has long been accepted that the issue of costs in relation to court proceeding is at the discretion of the court. For example, O 59 of the ROC 2012 reads costs of proceedings shall be at the discretion of the court. Being a

discretionary right, only the manner in which it was determined by the court of the first instant can be reviewed (see *ECM Libra Investment Bank Berhad v Foo Ai Meng & ors* [2013] 3 MLJ 35; [2013] 1 LNS 99). This ordinarily happens in the court proceedings and is always subject to law and/or the Rules of Court 2012. The exercise of discretion per se cannot be posed as a question of law though the litigant may have a right to review the manner the issue of costs was dealt with, ie whether the right consideration was taken into account, subject to the complainant demonstrating to the court an error in the exercise of discretion has indeed occurred and it is one of the categories appellate interference is warranted (see *Wah Bee Construction Engineering v Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858; *Majlis Peguam Malaysia v Raja Segaran a/l Krishnan* [2002] 3 MLJ 155);

(c) as a general rule costs of the proceedings will be determined by the adjudicator. Whether the adjudicators' decision can be appealed against or can be reviewed is always subject to specific provisions of the law and/or rules, case law, etc;

(d) it is also well established whether in court proceedings or arbitration (i) it is not an inflexible rule that a successful party must be awarded his costs; (ii) justice may demand that the successful party should be deprived of the whole or part of his own costs (see *P Rosen & Co Ltd v Dowley and Selby* [1943] 2 All ER 172); (iii) in exceptional circumstances, costs may be ordered against the successful party (see *Childs v Blacker* [1954] 1 WLR 809); etc.

(e) the learned author of the book titled *Arbitration And Conciliation*, (2nd Ed) by OP Malhotra, had this to say:

> The general principles adopted by the courts under the earlier legislation have been given legislative form in s 61(2) of the English Act of 1996 — 'Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances, this is not appropriate in relation to the whole or part of the costs'. In India, the law with respect to costs and apportionment has also been developed by the courts on similar lines. The law has now been encapsulated in s 31(8), though not in an as detailed fashion as the English law. In particular, the rule that the 'costs follow the event' has been specifically codified, while the Indian legislation does not make any such provision. Nevertheless, this does not mean that the rule has become inapplicable for allocation or award of costs.

(f) the AA 2005 specifically states that costs and expenses of the arbitration shall be at the discretion of the arbitral tribunal. And to ensure that discretion is not made illusory, s 8 curtails the power of court to intervene in the discretionary jurisdiction of the arbitrator. As the court's role to decide on costs or quantum had been specifically taken away by virtue of

ss 8 and 44 of the AA 2005 it is difficult even to fathom how the issue of costs in arbitral proceeding can be framed as a question of law for the determination of the High Court when the statute has specifically deprived the business of the High Court to deal with costs. In addition, O 69 r 2(1) of the ROC 2012 does not also reserve any right to review or decide on issue of costs which has been dealt by the arbitrator. Order 69 r 2(1) states:

> Claims under the 2005 Act (O 69 r 2(1))
>
> 2 (1) In this Order, 'arbitration claim' means any application to the Court under the 2005 Act, including a claim to:
>
> (a) appoint an arbitrator under subsection 13(7) of the 2005 Act;
>
> (b) decide on the challenge of an arbitrator under subsection 15(3) of the 2005 Act;
>
> (c) decide on the termination of the mandate of an arbitrator under subsection 16(2) of the 2005 Act;
>
> (d) appeal against the ruling of the arbitral tribunal on jurisdiction under subsection 18(8) of the 2005 Act;
>
> (e) enforce interlocutory orders or directions of an arbitral tribunal made under section 19 of the 2005 Act;
>
> (f) seek interlocutory orders or directions under section 11 of the 2005 Act;
>
> (g) determine under section 41 of the 2005 Act, any question of law arising in the course of the arbitration proceedings;
>
> (h) determine under section 42 of the 2005 Act, any question of law arising out of an award;
>
> (i) set aside an award under section 37 of the 2005 Act;
>
> (j) direct any matter in connection with bankruptcy proceedings under section 49 of the 2005 Act;
>
> (k) enforce an award under section 38 of the 2005 Act;
>
> (l) extend time under section 45 or 46 of the 2005 Act; and
>
> (m) seek an order under subsection 44(4) of the 2005 Act where the arbitral tribunal withholds its award for non-payment of fees and expenses.

(g) further O 59 r 2(2) impliedly recognises the provisions of ss 8 and 44 of the AA 2005. The said O 59 r 2(1) and (2) read as follows:

> 2(1) Where by virtue of any written law the costs of or incidental to any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any written law, not being proceedings in the High Court, are to be determined in the High Court, rule 6(6) and rule 13, shall

have effect in relation to proceedings for determination of those costs as they have effect in relation to proceedings for determination of the costs of or arising out of proceedings in the High Court.

(2) Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

(h) s 44 of the AA 2005 only allows an application to the High Court to tax costs in limited circumstance. Taxing costs means assessment of quantum of costs and is different from apportionment of costs such as in the instant case where the learned judge had said that the appellant is only entitled to half the costs in arbitration proceeding.

(i) the cases relied by the learned judge and also the respondent did not take into consideration the new chapter in arbitration pursuant to the AA 2005 and the consequential restrictive provisions in the ROC 2012, such as O 69 r 2(1), O 59 r 2(2), etc.

(j) the AA 2005 and the relevant provisions in the ROC 2012 must not be read in isolation. In the instant case ss 8, 42 and 44 must be read in composite and the reasonable conclusion applying the principle of interpretation will entail in the conclusion that the award of costs as well as the quantum is no more the business of the High Court save the issue of taxation only, as stated above.

[51] Judicial intervention under the old regime pursuant to the Arbitration Act 1952 was quite common and threshold to satisfy was much low, as reflected in a number of case laws. The courts took the position that arbitrators must strictly fulfil the requirement of strict judicial and adjudicating process and any omission, misconduct or breach, etc, will entail judicial intervention. The more recent cases before the AA 2005 came into force will demonstrate that courts have already taken cognisance of UNCITRAL Model Law which advocates minimum intervention and in consequence had increased the threshold for intervention. The court had ruled that the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside (see *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791).

[52] Taking the lead from the decision of the Court of Appeal in the *Crystal* case, it is my considered view that even though a litigant may satisfy s 42 of the AA 2005 that does not mean the award must be varied or be set aside in whole or part.

[53] The question in issue is not related to the trite principles on costs and/or general principles on costs or cases in jurisdiction where the issue of costs has been controlled by legislation and/or rules, cases, etc. The issue here is whether the court has jurisdiction to interfere with award of costs made by an arbitral tribunal pursuant to the AA 2005. In consequence the issue is more specific as opposed to general principles on costs. Cases in other jurisdiction may not be helpful for this purpose when those cases are not dealing with similar provisions (see *Khalid Panjang & Ors v Public Prosecutor (No 2)* [1964] 1 MLJ 108).

[54] For reasons stated above the appeal is allowed with costs. The order of the High Court is set aside.

I hereby order so.

Appeal allowed with costs of RM15,000.

Reported by Kohila Nesan